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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B5

FILE: [REDACTED] Office: Texas Service Center
SRC 08 004 55979

Date: MAR 26 2010

PETITIONER:
BENEFICIARY:

[REDACTED]

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that

office.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director is withdrawn, and the matter will be remanded to the Texas Service Center for further consideration.

On August 10, 2007, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, seeking the beneficiary's services as a project engagement manager pursuant to Section 203(b)(2) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

On July 31, 2007, the Texas Service Center issued a Request for Evidence indicating that the accompanying Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification application), does not require an advanced degree professional. Specifically, the Texas Service Center indicated that, because the Form ETA 750 only requires a bachelor's degree plus three years of work experience, the petitioner should withdraw the petition, request that the classification sought be changed to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A), or abandon the petition.

In response, the petitioner submitted a letter dated August 6, 2008 in which it argues that Items 14 and 15 of the Form ETA 750, when read together, demonstrate that the position actually requires a bachelor's degree plus eight years of experience and, thus, the position requires an advanced degree professional. The petitioner concludes its letter by stating:

However, if the experience in item 15 has already been considered in your finding that the position does not require the equivalent of an advanced degree, then we respectfully request option (b), that the classification sought be changed to 3rd preference.

On April 8, 2009, the director of the Texas Service Center denied the petition because the petitioner failed to establish that the position requires a member of the professions holding an advanced degree or an alien of exceptional ability. Section 203(b)(2) of the Act. The Texas Service Center did not consider the petition as one requesting classification as a professional or skilled worker pursuant to section 203(b)(3)(A)(i) or (ii) of the Act, i.e., 3rd preference.

On May 7, 2009, the petitioner filed an appeal. The petitioner reiterated its argument that the Form ETA 750 requires an advanced degree professional. The petitioner did not claim that the director

erred by failing to consider the petition in the alternative as one seeking classification as a professional or skilled worker pursuant to section 203(b)(3)(A)(i) or (ii) of the Act.

Based on information received from the U.S. Citizenship and Immigration Services Ombudsman, and as the record is currently constituted (*see supra*), it is unclear which classification the petitioner is seeking, 2nd preference or 3rd preference. Accordingly, the AAO sent a request for evidence on February 3, 2010 requesting that the petitioner specifically identify whether (1) it is seeking classification pursuant to section 203(b)(2) of the Act as originally requested in the Form I-140 or (2) whether it is seeking to change the classification sought to section 203(b)(3)(A)(i) or (ii) of the Act, as offered by the Texas Service Center in its request for evidence, and prefers that U.S. Citizenship and Immigration Services (USCIS) consider the petition pursuant to that classification.

On March 3, 2010, the petitioner responded to the AAO's request for evidence by specifying in a letter dated March 1, 2010, that it wishes for USCIS to consider the petition pursuant to the third preference category, section 203(b)(3)(A)(i) or (ii) of the Act.

Accordingly, as the Texas Service Center has never considered the instant petition for eligibility under the 3rd preference category, the decision of the director considering the petition under the 2nd preference category is withdrawn, and the matter is remanded to the Texas Service Center for consideration as a petition for a professional or skilled worker pursuant to 203(b)(3)(A) of the Act, 8 U.S.C. §1153(b)(3)(A). It is noted that the director was under no statutory or regulatory obligation to consider the instant petition under the 3rd preference category. The petitioner specifically requested the 2nd preference category in the petition. However, because the director used his discretion to offer the petitioner the opportunity to amend its petition in the request for evidence before adjudication and to change the requested classification to the 3rd preference, and because the petitioner attempted to avail itself of this opportunity in its response to the request for evidence (albeit obliquely), it is appropriate that this matter be remanded for consideration as a 3rd preference petition.

ORDER: The decision of the director is withdrawn, and the matter will be remanded to the Texas Service Center for further consideration as petition for a professional or skilled worker pursuant to 203(b)(3)(A) of the Act, 8 U.S.C. §1153(b)(3)(A).